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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

PUBLIC COMMENT - SPECIAL ORDER OF BUSINESS

INTRODUCTION

At the March 18, 2003, meeting of the City Council, a member of the public asked to speak on an agenda item designated as a Special Order of Business, and was denied. At the Mayor's request, the City Attorney explained that, historically, the prior City Attorney and the two prior Mayors had determined that Special Orders of Business items were not subject to public comment because they are not debatable items. This report discusses the applicable laws and concludes that the public should be allowed to comment on agenda items designated as a Special Order of Business.

DISCUSSION

The Ralph M. Brown Act [Brown Act], states that: "[e]very agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body." Cal. Gov't Code § 54954.3. This provision clearly mandates that members of the public must be provided an opportunity to comment at City Council meetings on any matter subject to the City Council's jurisdiction. Members of the public must be given an opportunity to address the legislative body on "any agenda item of interest to the public." 84 Op. Cal. Att'y Gen. 30 (2001). Any item designated as a Special Order of Business of the City Council is a matter on the agenda and a matter within the City Council's jurisdiction, so any prohibition of public comment on such matters would violate the above provision of the Brown Act.

The Brown Act does allow local jurisdictions some latitude in how public comment may be made: “So long as the body acts fairly with respect to the interest of the public and competing factions, it has great discretion in regulating the time and manner, as distinguished from the content, of testimony by interested members of the public.” *The Brown Act: Open Meetings For Local Legislative Bodies*, California Attorney General (2003), p. 28. However, the Brown Act does not permit local agencies to adopt provisions that are more restrictive than what is provided for under the Brown Act. Only the opposite is allowed: “legislative bodies of local agencies may impose requirements upon themselves which allow *greater access* to their meetings than prescribed by the minimal standards set forth in this chapter.” Cal. Gov't Code § 54953.7 (emphasis added).

The Attorney General's handbook echoes the Brown Act's guarantee of the public's right to speak: “Under the Act, the public is guaranteed the right to provide testimony at any regular or special meeting on any subject which will be considered by the legislative body before or during its consideration of the item.” *The Brown Act: Open Meetings For Local Legislative Bodies*, California Attorney General (2003), p. 27. “The Act provides that the legislative body shall not prohibit a member of the public from criticizing the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body. (§ 54954.3(c).) Public meetings of governmental bodies have been found to be limited public fora. As such, members of the public have broad constitutional rights to comment on any subject relating to the business of the governmental body. Any attempt to restrict the content of such speech must be narrowly tailored to effectuate a compelling state interest.” *The Brown Act: Open Meetings For Local Legislative Bodies*, California Attorney General (2003), p. 28.

The City Council has incorporated the provisions of the Brown Act into San Diego Municipal Code section 22.0101, Permanent Rules of the Council. (See, Council Policy 000-16). The Permanent Rules set forth the procedures for conducting City Council meetings. With respect to public comment, Rule 8, “Nonagenda Public Comment,” provides that “[e]very agenda for a regular Council meeting shall provide a period on the agenda for members of the public to address the Council on items of interest to the public that are not on the agenda, but are within the jurisdiction of the Council.” Rule 9, “Procedure for Debate,” allows testimony by members of the public who support and who oppose “any resolution or ordinance.” On the other hand, Rule 4, “Special Orders of Business,” states that the items “are not debatable” and that “[d]iscussion during the meetings of the City Council of items listed on the agenda as Special Order of Business are within the discretion of the chairperson.”

As currently written, the Permanent Rules establish a procedural scheme in which members of the public may comment on non-agenda items during the non-agenda public comment period, and may comment on debatable items during the debate period. However, the rules do not explicitly require an opportunity for the public to comment on items that are designated as Special Orders of Business, even though they are on the agenda for consideration by the City Council. This is arguably contrary to the requirements of the Brown Act and the public's broad right to comment on any subject relating to the business of a governmental agency.

CONCLUSION AND RECOMMENDATION

The Brown Act requires that the public be allowed to speak before or during any item being considered by the City Council that is within its subject matter jurisdiction. Special Orders of Business items are on the agenda and are within the jurisdiction of the City Council, accordingly, members of the public should have an opportunity to speak on the items. The City Council has significant discretion in regulating the time and manner of public comment. One option is to simply allow the public the opportunity to speak on any Special Order of Business item as it comes up on the agenda. This would be consistent with the present rule which allows discussion of Special Orders of Business at the discretion of the chairperson. Alternatively, the City Council could amend the Permanent Rules to allow public comment on non-debatable agenda items to be heard during the period currently set aside for non-agenda public comment. However, the Permanent Rules would need to be amended to ensure that the public comment occurred before or during consideration of the Special Orders of Business items.

Respectfully submitted,

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